IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-4351

Summary Calendar

ROBERT LANDRY, JR.,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,
Represented by the Secretary of
Transportation, acting by and
through the Maritime Administrator, Et Al.,

Defendant-Appellee.

****

No. 93-4443

Summary Calendar

ROBERT LANDRY, JR.,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA, ET AL.,

Defendants-Appellees.

****

No. 93-4971

Summary Calendar

ROBERT LANDRY, JR.,

Plaintiff-Appellant,

versus

AMERICAN FOREIGN SHIPPING CO., INC.,

Defendant-Appellee.

Appeals from the United States District Court
for the Eastern District of Texas
(1:92-CV-264, 1:92-CV-549 & 1:92-CV-0542)

(March 29, 1994)

Before KING, DUHÉ and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

These consolidated appeals all relate to claims asserted by Robert Landry, Jr., arising out of personal injuries he allegedly suffered while working in the cargo hold of the M/V CAPE CATAWBA.

I. BACKGROUND

A. FACTS

[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

The following facts are derived from Landry's complaints filed at various times in federal district court.

On or about December 19, 1990, the vessel M/V CAPE CATAWBA was berthed in the port at Beaumont, Texas, where it was receiving cargo intended for United States military forces. Landry's complaints indicate that the vessel was owned by the United States and that American Foreign Shipping Co., Inc. (AFS), was under contract with the United States to provide the crew to man and operate the vessel. Landry, a longshoreman, was working in the hold of the CAPE CATAWBA while it was in Beaumont. While climbing a ladder from the hold, Landry alleges, he was struck by a light cord being moved by a crew member of the vessel, became tangled in the cord, and was pulled off the ladder and fell to the deck, sustaining injuries on impact.

B. Procedural History

The procedural history of this case is complex. Landry first filed a complaint in federal court on June 25, 1992, naming as defendants the United States and AFS (the first-filed action). In his complaint, Landry asserted claims based on the negligence of the vessel and its crew. The record reflects that service of process was not executed on the United States until October 13, 1992. The United States moved for dismissal on behalf of AFS under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), and for dismissal on its own behalf under Rule 12(b)(1) on December 17, 1992. The United States argued that Landry's exclusive remedy was against the United States under the Public Vessels Act

(PVA), 46 U.S.C. App. §§ 781-89, and the Suits in Admiralty Act (SAA), 46 U.S.C. App. §§ 741-52, and that the United States was itself entitled to dismissal because Landry had failed to effect "forthwith service" on the United States as required by the SAA, 46 U.S.C. App. § 742.

In the meantime, Landry had filed a second complaint grounded on the same facts in federal court in the same federal district on December 15, 1992 (the second-filed complaint). AFS was the only named defendant in this complaint. On December 18, 1992, Landry filed still a third complaint in federal court in the same federal district (the third-filed action), this time naming the United States, AFS, John Doe (the crew member who caused Landry's accident), and Lykes Bros. Steamship Co. (Lykes Bros.). The third-filed action was consolidated with the first-filed action on December 21, 1992.

On January 14, 1993, the district court hearing the two consolidated cases issued a notice that it could treat the United States' motion to dismiss AFS as a motion for summary judgment and that it had accepted and would continue to accept matters outside the pleadings for consideration. On March 1, 1993, the court granted the United States' motion to dismiss AFS "either as a motion to dismiss or as a motion for summary judgment." The court also dismissed the United States without prejudice because of Landry's 110-day delay in serving the United States. Finally, the court severed Landry's third-filed action, directing that the action would proceed under its former docket number. The March

1, 1993, memorandum opinion and order is reported as Landry v. United States, 815 F. Supp. 1000 (E.D. Tex. 1993). The appeal from this order has been logged as No. 93-4351.

On March 11, 1993, the United States moved to dismiss AFS, John Doe, and Lykes Bros. from the third-filed action under Federal Rules of Civil Procedure 12(b)(1) or 12(b)(6). The United States urged dismissal of AFS based on the court's March 1 dismissal of AFS with prejudice. The United States also urged dismissal of John Doe because of the United States' inability to identify that defendant, and dismissal of Lykes Bros. because Lykes Bros. was not the owner, charterer, or owner pro hac vice of the CAPE CATAWBA, nor was it a vendor or supplier of the vessel. On March 16, 1993, the United States filed a motion for summary judgment in favor of AFS, John Doe, and Lykes Bros. for the same reasons as previously urged in the motion to dismiss.

On April 2, 1993, the district judge hearing Landry's second-filed action ordered that the case be transferred and consolidated with the remaining pending action (the third-filed action). That same day, the court hearing the third-filed action granted in part the United States' motion for summary judgment, dismissing AFS and Lykes Bros. with prejudice. The court allowed Landry additional time to file an amended complaint and to serve the John Doe referred to in his complaint. That same day the court gave notice that it could grant summary judgment for AFS sua sponte in the second-filed action for the same reasons as had been relied upon in the first-filed action. Landry filed a

notice of appeal from the April 2 judgment, and this appeal has been logged as No. 93-4443.

On May 11, 1993, the district court granted summary judgment sua sponte in favor of AFS in the second-filed action, eliminating AFS from the proceedings altogether. The court further dismissed John Doe with prejudice due to Landry's failure to identify that defendant. The court also severed the proceedings, directing that the case would proceed under the docket number of the third-filed action. Landry filed a notice of appeal from the May 11 order, and this appeal has been logged as No. 93-4971.

II. STANDARD OF REVIEW

We review the granting of summary judgment de novo, applying the same criteria used by the district court in the first instance. That is, we review the evidence and inferences to be drawn therefrom in the light most favorable to the nonmoving party. Federal Deposit Ins. Corp. v. Dawson, 4 F.3d 1303, 1306 (5th Cir. 1993); Fraire v. City of Arlington, 957 F.2d 1268, 1273 (5th Cir.), cert. denied, 113 S. Ct. 462 (1992). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c).

III. ANALYSIS

A. The First-Filed Action

1. *Dismissal of AFS with Prejudice*

Before addressing the substance of the district court's order granting the United States' motion to dismiss AFS with prejudice, or, in the alternative, granting summary judgment in favor of AFS, we review the legal backdrop of this case.

Section 781 of the PVA provides that a libel in personam in admiralty may be brought against the United States for damages caused by a "public vessel of the United States." 46 U.S.C. App. § 781. The PVA thus provides for a limited waiver of the United States' sovereign immunity. Favorite v. Marine Personnel and Provisioning, Inc., 955 F.2d 382, 385 (5th Cir. 1992). The PVA also incorporates the provisions of the SAA to the extent that those provisions are not inconsistent with the PVA. 46 U.S.C. App. § 782; Williams v. Central Gulf Lines, 874 F.2d 1058, 1059-60 (5th Cir. 1989), cert. denied, 493 U.S. 1045 (1990). The SAA provides as follows:

> [W]here a remedy is provided by this chapter it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States or of any incorporated or unincorporated agency thereof whose act or omission gave rise to the claim.

46 U.S.C. App. § 745. This exclusivity provision is thus incorporated into the PVA by operation of § 782. Williams, 874 F.2d at 1059-60; Domantay v. United States Dep't of the Navy, 785 F. Supp. 974, 975 (M.D. Fla. 1992). Thus, if the CAPE CATAWBA was a "public vessel" within the meaning of the PVA and AFS was

the "agent or employee" of the United States within the meaning of the SAA, then Landry's exclusive remedy for injuries caused by the CAPE CATAWBA or its crew is against the United States. Favorite, 955 F.2d at 385, 388.

Landry does not attack the conclusion that the CAPE CATAWBA was a public vessel within the meaning of the PVA. He vigorously contests, however, the district court's conclusions (1) that Landry's complaint on its face establishes that AFS was the agent of the United States within the meaning of the SAA, and (2) that the summary judgment evidence entitled AFS to summary judgment on the agency issue. We will address the propriety of the summary judgment first.

The concept of agency as embodied in the SAA embraces "any instrumentality through and by which public vessels are operated." Id. at 388 (citing Petition of United States, 367 F.2d 505, 510 (3d Cir. 1966), cert. denied, 386 U.S. 932 (1967)). In Favorite, the United States was the bareboat charterer of the USNS SEALIFT CARIBBEAN and contracted with various subsidiaries of Marine Tranport Lines, Inc. (MTL), to provide the maintenance, operations, and crew of the vessel. Id. at 384. We held that the vessel was a public vessel within the meaning of the PVA and that MTL was the agent of the United States within the meaning of the SAA. Significant to our decision were the facts that MTL was acting on the behalf of the United States and that MTL was subject to the United States' control and direction. Id. at 388. We noted also that the vessel was operated for a government

purpose: the movement of Department of Defense petroleum products worldwide. Id. The question, then, is whether the United States' summary judgment evidence showed that there was no genuine issue of fact with respect to the relationship between the United States and AFS.

In connection with its motion to dismiss AFS, the United States filed an affidavit by Ann T. Danzi, records custodian for the Division of Marine Acquisition of the Maritime Administration, United States Department of Transportation, to the effect that the United States had owned the CAPE CATAWBA since November 19, 1990, and that AFS had been the United States' agent in operating the CAPE CATAWBA under a service agreement, Agreement No. DTMA91-90-A-10010, also effective November 19, 1990. Attached to the affidavit is a duplicate of that service agreement between the United States and AFS. The United States also filed the affidavit of AFS President Harry W. Marshall, in which Marshall attested that he had personal knowledge of the agreement whereby

> [AFS] served as General Agent for [the United States] concerning the M/V CAPE CATAWBA and that the General Agency Agreement was in effect during the time of **[sic]** the Plaintiff's injury is alleged to have occurred.

Attached to the affidavit are five pieces of correspondence between AFS and the United States Maritime Administration. Two of the letters indicate that the CAPE CATAWBA was assigned to AFS during 1988. The third letter, however, purports to assign the CAPE CATAWBA to AFS under the general agency agreement as of March 1, 1991SQafter Landry's accident.

The district court relied on one other source of evidence as establishing AFS's status as agent for the United States in operating the CAPE CATAWBA. Landry's complaint in the third-filed action affirmatively alleged that, at all pertinent times, "defendant [AFS] provided or was responsible to provide the crew which operated the vessel M/V CAPE CATAWBA," and, more significantly, that at all pertinent times "defendant [AFS] was agent and/or operator of the vessel and was under contract to the United States to provide the crew which operated the vessel M/V CAPE CATAWBA." Because the third-filed action had been consolidated with the first-filed action, the district court considered Landry's allegations in the third-filed complaint as judicial admissions effective in the first-filed action as well. Landry, 815 F. Supp. at 1004.

Landry points out that the agreement, although designating AFS as the "general agent" of the United States, did not specifically assign the CAPE CATAWBA to the care of AFS. Landry also directs our attention to the formalities required by the agreement in order for an assignment of a vessel to AFS to occur:

> b. The United States, after consultation with [AFS], will assign or delete the Vessel by name and location. The assignments and deletions shall be in writing, either by letter or by cable or telegram confirmed by letter, and addressed to [AFS] . . . . [AFS] will execute an acceptance of the letter and return two original counterparts to the United States. Each assignment and deletion shall constitute a formal modification of this Agreement.

In Landry's view, the affidavits from Danzi and Marshall lose their probative force because the United States never introduced

a written assignment of the CAPE CATAWBA to the charge of AFS effective prior to Landry's accident.

We agree that AFS was entitled to summary judgment based on this summary judgment record, despite the lack of documentary evidence proving that the CAPE CATAWBA had officially been assigned to AFS's charge. The record is similar to the one we reviewed in Doyle v. Bethlehem Steel Corp., 504 F.2d 911 (5th Cir. 1974). Doyle was a shipyard worker who was injured on the USNS YUKON, a vessel owned by the United States, and he brought suit against Mathiasen's Tanker Industries, Inc. (Mathiasen's), the contractual operator of the vessel. Id. at 912. Mathiasen's moved for and received summary judgment based on the exclusivity provision of the SAA. Id. Doyle argued before this court that summary judgment was inappropriate because the contract between the United States and Mathiasen's did not specifically name the YUKON; this omission, he argued, created a genuine issue of fact regarding Mathiasen's status as agent of the United States. Id. at 913. We disagreed, however, giving credence to the depositions of the YUKON's chief officer and Mathiasen's port engineer, which established that Mathiasen's operated the YUKON for the United States Navy. Id. at 913-14. Because Doyle submitted no contrary evidence on this issue, we affirmed summary judgment in favor of Mathiasen's. Id. at 914.

Landry's argument that the Best Evidence Rule should have precluded the district court from considering the affidavit evidence misses the mark. The Rule requires production of an

original writing, recording, or photograph when the contents of the writing, recording, or photograph are sought to be proved. FED. R. EVID. 1002. As the district court observed, the issue in the instant case is not the content of any writing or document but rather the existence of an agency relationship between the United States and AFS within the meaning of Doyle and Favorite. Landry, 815 F. Supp. at 1005. To be sure, production of a written assignment of the CAPE CATAWBA to the AFS's charge would have been highly probative of the existence of such an agency relationship. The issue to be proved, however, was not the content of such a writing, but whether AFS was operating the CAPE CATAWBA on behalf of the United States at the time of Landry's accident. See Favorite, 955 F.2d at 388; Doyle, 504 F.2d at 914. The affidavit evidence was admissible with respect to that issue.

Landry argues that we should draw a negative inference from the United States' failure to produce a written assignment of the CAPE CATAWBA to the care of AFS. Any such inference, however, is more than offset by the other evidence considered by the district court: Landry's affirmative assertions in his pleadings that AFS was responsible for operating the CAPE CATAWBA at the time of his accident, and that AFS was responsible specifically to the United States to perform this function. We have repeatedly stated that factual assertions made in a party's pleadings constitute judicial admissions that are ordinarily binding on that party. Campbell v. Sonat Offshore Drilling, Inc., 979 F.2d 1115, 1119 (5th Cir. 1992); White v. ARCO/Polymers, Inc., 720 F.2d 1391,

1396 (5th Cir. 1983). In the instant case, Landry has pleaded the very fact that we relied upon in Doyle as establishing agent status: that AFS operated the CAPE CATAWBA for the United States. Landry has not demonstrated to this court why this admission should not constitute summary judgment evidence against him.

Taken as a whole, the evidence consisting of the two affidavits and assertions from Landry's pleadings establishes that AFS was the agent of the United States in operating the CAPE CATAWBA. Because Landry did not raise a genuine issue of material fact regarding AFS's status as agent, we affirm the grant of summary judgment in favor of AFS in the first-filed action. Accordingly, we do not reach the merits of the court's Rule 12(b)(6) dismissal of AFS.

2. *Dismissal of the United States for Lack of "Forthwith" Service*

The court below dismissed the United States from the first-filed action without prejudice for lack of subject-matter jurisdiction because Landry delayed in serving the United States for 110 days. Landry, 815 F. Supp. at 1002-03. The court based its decision on the SAA, 46 U.S.C. App. § 742, which provides that a plaintiff who brings a libel in personam against the United States "shall forthwith serve a copy of his libel on the United States attorney" for the appropriate district. We have stated that failure to comply with the forthwith service requirement of § 742 is a jurisdictional defect that divests the federal district court of subject-matter jurisdiction in the controversy. Anh Thi Kieu v. United States, No. 91-4596, slip

op. at 3 (5th Cir. Jan. 21, 1992) (unpublished opinion) (citing Amella v. United States, 732 F.2d 711, 713 (9th Cir. 1984)).

The United States contends, and we agree, that we need not review the district court's dismissal on the merits because the issue of forthwith service has become moot. Landry's third-filed complaint alleges the same cause of action against the United States as does his first, and we note that the third-filed complaint was filed and served on the United States attorney on the same day, December 18, 1992, avoiding any "forthwith service" problem. Consequently, the United States remains a defendant in Landry's action. "If a dispute has been resolved or if it has evanesced because of changed circumstances . . . it is considered moot." American Medical Ass'n v. Bowen, 857 F.2d 267, 270 (5th Cir. 1988). Landry does not show that any consequences, negative or otherwise, have resulted or will result from the dismissal, or that reversal of the dismissal will at all affect the status quo. Because the dismissal of the United States from the first-filed action does not now present an actual case or controversy, we may not review its propriety on appeal.

B. THE THIRD-FILED ACTION

We turn next to Landry's third-filed action, which was the next matter disposed of by the court below. The court first granted summary judgment in favor of AFS and Lykes Bros. by order entered April 2, 1993. Judgment was granted in favor of AFS for the same reasons the court cited in its prior order; judgment was granted in favor of Lykes Bros. on the basis of Landry's

admission that Lykes Bros. had nothing whatsoever to do with the CAPE CATAWBA. On May 11, 1993, the district court also dismissed the John Doe defendant with prejudice because Landry had failed to identify and serve John Doe within the time the court had originally allotted at Landry's request.

With respect to the district court's disposal of the third-filed action, Landry presses into service mostly the same arguments that he relies upon in conjunction with the first-filed action. He also relies upon the United States' responses to his requests for admissions, responses that Landry himself admits were not before the district court at the time it made its April 2, 1993, ruling. In these responses, the United States admitted that "[i]n order for a general agent to be serving as general agent with regard to a given vessel, the United States requires a written assignment of that vessel to the general agent." Landry neglects to point out that, in the same responses, the United States denied that "[o]n December 19, 1990, a specific written assignment of M/V CAPE CATAWBA to American Foreign Shipping Co., Inc. was not in force and effect."

Even if these admissions by the United States would have sufficed to defeat summary judgment in favor of AFS (an assumption that appears to us to be contrary to fact), these responses are not a part of the record on appeal, nor were they a part of the summary judgment record before the district court when it entered its April 2, 1993, ruling. We have noted that materials not presented to the district court for consideration

in connection with a summary judgment motion are never properly before this court on appeal. Fields v. City of South Houston, 922 F.2d 1183, 1188 (5th Cir. 1991); see also Skotak v. Tenneco Resins, Inc., 953 F.2d 909, 915 (5th Cir.) ("[T]his court, for obvious reasons, will not consider evidence or arguments that were not presented to the district court for its consideration in ruling on the motion [for summary judgment]."), cert. denied, 113 S. Ct. 98 (1992). Likewise, we are barred from considering on appeal any filings that are outside the record on appeal; this rule applies even to matters that are attached to briefs or included in "record excerpts." GHR Energy Corp. v. Crispin Co. Ltd. (In re GHR Energy Corp.), 791 F.2d 1200, 1201-02 & n.2 (5th Cir. 1986).

The third-filed action thus comes to us indistinguishable in form and substance from the first-filed action. For the same reasons that summary judgment in favor of AFS was appropriate in the first-filed action, we conclude that summary judgment in favor of AFS was also appropriate in the third-filed action.

In connection with the third-filed action, Landry also challenges the district court's dismissal of the John Doe defendant with prejudice. He contends that his notice of appeal, filed on April 21, 1993, divested the district court of jurisdiction over the matter and so deprived the court of the authority to dismiss John Doe with prejudice on May 11, 1993. The United States responds that the district court's judgment was a final judgment only as to AFS and Lykes Bros. and that this

summary judgment was an appealable interlocutory order under 28 U.S.C. § 1292(a)(3) (conferring appellate jurisdiction over "[i]nterlocutory decrees . . . determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed"). If an appeal is allowed from an interlocutory order, the district court may proceed with matters not involved in the appeal. Garcia v. Burlington N. R.R. Co., 818 F.2d 713, 721 (10th Cir. 1987); Taylor v. Sterrett, 640 F.2d 663, 668 (5th Cir. Unit A March 1981).

Landry's contention that the district court lacked jurisdiction to dismiss John Doe with prejudice is thus without merit.

C. The Second-Filed Action

Finally we come to the action that Landry filed solely against AFS. The district court granted summary judgment sua sponte in favor of AFS on May 11, 1993, based on the same reasons that it cited in support of the two prior judgments in favor of AFS. At the same time, the court severed the second-filed action from the third-filed action, permitting the latter to proceed with the United States as the only defendant. Landry filed his notice of appeal from the summary judgment on June 17, 1993.

We raise matters concerning our own jurisdiction sua sponte. See Stewart v. Lubbock County, 767 F.2d 153, 155 n.3 (5th Cir. 1985) ("[T]his Court could and should raise sua sponte any questions concerning jurisdiction in matters properly before this Court."), cert. denied, 475 U.S. 1066 (1986). A timely notice of

appeal is a mandatory prerequisite to the exercise of appellate jurisdiction. Resolution Trust Corp. v. Northpark Joint Venture, 958 F.2d 1313, 1316 (5th Cir. 1992), cert. denied, 113 S. Ct. 963 (1993). Unless the United States or an officer or agency thereof is a party, a notice of appeal must be filed within thirty days after the date of the order or judgment appealed from. FED. R. APP. P. 4(a)(1). Landry did not file his notice of appeal within thirty days of the judgment in favor of AFS in the second-filed action. Although the second-filed action was consolidated with the third-filed action, to which the United States was a party, the district court severed the two actions simultaneously with the judgment now complained of. The thirty-day time limit for filing a notice of appeal thus applied to Landry in connection with the disposition of the second-filed action. Because Landry did not file a timely notice of appeal from the summary judgment in favor of AFS in the second-filed action, we lack jurisdiction and must dismiss. See Nelson v. Foti, 707 F.2d 170, 171 (5th Cir. 1983) ("[A] timely notice of appeal is a mandatory precondition to the exercise of our jurisdiction.").

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the judgments of the district court in Nos. 93-4351 and 93-4443. We DISMISS Landry's appeal in No. 93-4971.